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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. [redacted]105

EARL LEROY SCOTT, HARRY D. CRONE, Executor Estate of ESTHER SCOTT CRONE, Deceased, and HERBERT NUSHAWG, *Petitioners,*

v.

FAYETTE COUNTY AGRICULTURAL SOCIETY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

CHARLES G. WHITE
FORREST E. ELY
HAROLD A. KERTZ
LUCIEN H. MERCIER
Counsel for Petitioners

MERCIER, KERTZ, SANDERS & BAKER
ELY, WHITE & DAVIDSON
Of Counsel

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Earl LeRoy Scott, Harry D. Crone, Executor Estate of Esther Scott Crone, deceased and Herbert Nushawg, Petitioners, pray that a writ of certiorari issue to review the orders of the Supreme Court of Ohio, overruling Petitioners' Motion to Certify the Record, dismissing Petitioners' Appeal as of Right from a judg-

ment and decree of the Court of Appeals, Fayette County, Ohio, and denying Petitioners' Application For Rehearing.

OPINIONS BELOW

The proceeding against Respondent originated in the Court of Common Pleas, Fayette County, Ohio, which Court rendered an opinion in favor of Petitioners on May 26, 1954. Said opinion was entered on May 29, 1954, is not reported, and is attached hereto as Appendix A.

The Court of Appeals, Fayette County, Ohio, reversed the judgment of the Court of Common Pleas in an opinion rendered November 19, 1955. The judgment and decree of said Court was entered December 10, 1955, is unreported, and is attached hereto as Appendix B.

On February 8, 1956, the Supreme Court of Ohio overruled Petitioners' Motion to Certify the Record and dismissed Petitioners' Appeal as of Right from the judgment and decree of the Court of Appeads. On February 29, 1956, the Supreme Court of Ohio denied Petitioners' Application for Rehearing. Said orders are unreported and journal entries of the same, are attached hereto as Appendix C.

JURISDICTION

The order of the Supreme Court of Ohio denying Petitioners' Application For Rehearing was entered February 29, 1956.

The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

The Supreme Court of Ohio overruled Petitioners' Motion to Certify the Record and dismissed their Appeal as of Right from the judgment and decree of the Court of Appeals, Fayette County, Ohio, which had refused to enjoin proceedings instituted to appropriate the private property of Petitioners. For simplification, the following questions which are presented for review are intended to refer to the judgment and decree of the said Court of Appeals, as well as to the orders of the Supreme Court of Ohio.

I. Did the Supreme Court of Ohio deprive Petitioners of their constitutional rights by its decision holding that Section 1711.14, Ohio Revised Code, does not violate the Fifth and Fourteenth Amendments to the Constitution of the United States, and Section 19 of Article I of the Constitution of Ohio?

II. Assuming, *arguendo,* that the statute did not violate the Fifth and Fourteenth Amendments to the Constitution of the United States and Section 19 of Article I of the Constitution of Ohio, is the constitutional requirement of just compensation for the taking of private property satisfied in the instant case when Respondent at time of instituting its proceeding to appropriate had insufficient funds with which to pay a compensation award, had taken no steps to provide for the payment of any compensation award, and, as a private corporation, at no time possessed legal authority to provide security or to raise funds in the manner permitted to municipal corporations?

III. Assuming, *arguendo,* that Respondent had adequate funds or could acquire adequate funds with

which to pay for the reasonable value of the property to be taken,

(a) Did the Supreme Court of Ohio err in failing to hold that Respondent acted arbitrarily and in bad faith in seeking to appropriate land in excess of that reasonably necessary for use as a site for agricultural fair purposes?

(b) Did the Supreme Court of Ohio err in failing to hold that the taking of title to property having an estimated value of $250,000 for use as a site for agricultural fair purposes during only 4 days of each year was not a "necessary" public use?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the Fifth and Fourteenth Amendments to the Constitution of the United States and Section 19 of Article I of the Constitution of Ohio.

The pertinent portion of the Fifth Amendment to the Constitution of the United States is as follows:

"* * * nor shall private property be taken for public use, without just compensation."

The pertinent portion of the Fourteenth Amendment to the Constitution of the United States is as follows:

"* * * nor shall any State deprive any person of life, liberty, or property without due process of law; * * *"

Section 19 of Article I of the Constitution of Ohio provides as follows:

> "Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, the compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."

The statutes involved are:

Sections 719.06, 719.21, 1711.14, 1711.15, 1711.16, 1711.18 and 1711.33, Ohio Revised Code.

The above sections of the Ohio Revised Code are attached hereto as Appendix D.

STATEMENT OF CASE

Petitioners are the owners of certain land situate at Washington Court House, Fayette County, Ohio, consisting of two (2) parcels. One parcel contains 47.033 acres and the other contains 2/10ths of an acre. In 1951, Petitioners leased thirty-seven (37) acres of the lands owned by them to the County Commissioners of Fayette County for a period of twenty (20) years, expiring January 1, 1971, at a nominal rental (R. 40, 104, 105). The lease was entered into for the benefit of Respondent and it expressly provided that the County Commissioners had the right to sublet the land to Respondent for its use as an agricultural fair site (R. 46, 106). As a matter of fact, Respondent had been in possession of said thirty-seven (37) acres and

had used the same as an agricultural fair site for more than sixty-five (65) years under a lease (R. 119).

The remaining ten (10) acres owned by Petitioners consist of a strip of land along a state highway having a length of 2068 feet and a depth of 200 feet. This strip of land was not included in the lease to the County Commissioners for three reasons. In the first place, unlike the remaining thirty-seven (37) acres, it had never been used by Respondent as a part of its agricultural fair site (R. 107). In the second place, it possessed an increasing value for commercial use by reason of its fronting on a state highway (R. 200), and, lastly, it was not desired by the County Commissioners.

Respondent is a private corporation organized for profit under the laws of Ohio. For many years, it has held county fairs for a four-day period in each year on the thirty-seven (37) acre tract above referred to and, since 1951, it has enjoyed possession and use of the tract under a sublease from the County Commissioners of Fayette County (R. 104, 106). In addition to holding agricultural fairs, Respondent has also used the leased lands for private purposes (as distinguished from public purposes), such as livestock sales, carnivals, horse stables, horse shows and sales, all of which was admittedly for the purpose of making profit (R. 84, 108, 121). The use of the land for an agricultural fair or public use was limited to only four days in each year (R. 108), while the use of the land for private use was fairly continuous during each year except when the four-day fair was scheduled (R. 121 et seq.).

In addition to the thirty-seven (37) acre tract belonging to Petitioners, Respondent also had available

under lease an adjoining tract of ten (10) acres (not here involved) for use in parking automobiles (R. 108).

On September 26, 1949, the Ohio Legislature enacted Section 1711.14, Ohio Revised Code, which provides as follows:

> "When it is necessary in the opinion of any county agricultural society to procure or enlarge any site *for the purpose of holding an agricultural fair*, and the society and the owner of the property needed for such purposes are unable to agree upon the sale and purchase thereof, the society shall make an accurate plat and description of the parcel of land which it desires for such purpose, and file them with the Probate Judge, or with the Court of Common Pleas in the county in which the land sought to be taken is located. Thereupon the same proceedings of appropriation shall be had which are provided for in Section 719.06 to 719.21, inclusive, of the Revised Code." (Emphasis supplied)

Sections 719.06 to 719.21, inclusive, of the Ohio Revised Code, cover appropriation of property by municipal corporations which, of course, have the power to levy taxes and appropriate money. An agricultural society such as Respondent does not have the power to levy taxes and appropriate money and is dependent on its own earnings, if any, and on voluntary contributions from the County Commissioners under certain conditions and limited as to amount by statute.

On February 13, 1953, Respondent, pursuant to Section 1711.14 above quoted, filed a petition in the Court of Common Pleas, Fayette County, Ohio, to appropriate the forty-seven (47) acres of land owned by Petitioners, including the thirty-seven (37) acres with re-

spect to which it already had possession under a sublease from the County Commissioners. Thereafter, Petitioners filed in said Court a petition for injunctive relief seeking to restrain the Respondent from proceeding with its action to appropriate for title the lands of Petitioners. In their complaint, Petitioners first raised the constitutional questions here sought to be reviewed (R. 40, 69).

The evidence adduced in the lower Courts clearly showed that the lands of Petitioners had a value of between Two Hundred Twenty-five Thousand ($225,000) Dollars and Two Hundred Fifty Thousand ($250,000) Dollars (R. 195); that at the time the proceedings were instituted by the Respondent, it had less than Twenty Thousand ($20,000) Dollars in its treasury (R. 110, 118, 141), and possessed no legal means of raising funds to pay an award that might be made in an appropriation proceeding; and that Respondent sought to appropriate more land than was reasonably necessary for use as a site for an agricultural fair.

On May 26, 1954, the Court of Common Pleas concluded that Petitioners were entitled to the relief prayed for and that Respondent should be permanently enjoined from proceeding to appropriate Petitioners' lands. In its opinion (Appendix A), the Court stated:

> "It is inconceivable to this Court that the use of the property of the plaintiffs for the purpose of a county fair for a period of 4 days in the year can be said to be such a necessary public use as to require private owners of land to forfeit the same when their desire is not to do so, whatever the motive may be. The fact that it must be presumed that they would be adequately compensated under appropriation proceedings provided by law is not

a satisfactory answer. For instance, it may well be the desire of the property owners to retain the property for a period of years with the expectation that its value would be greatly enhanced in the future to their profit, and there may be other reasons, sentimental and otherwise, why the owners would desire to retain their property."

The Respondent appealed from the judgment of the Court of Common Pleas to the Court of Appeals, Fayette County, Ohio, and Petitioners filed a cross-appeal. The cause was submitted on the pleadings, transcript of the docket and journal entries, transcript of evidence, depositions and brief of counsel. On November 19, 1955, the Court of Appeals rendered its opinion reversing the court of Common Pleas and finding in favor of Respondent on all issues. In support of its opinion the Court found from the testimony of Respondent's officers that Respondent would use all of Petitioners' lands for its purposes; that no evidence was offered tending to show that Respondent would be unable to pay the amount of the assessed valuation; that no evidence was offered tending to show a want of good faith on the part of Respondent in seeking to appropriate Petitioners' lands; and that there was no showing that Respondent had acted arbitrarily or had been guilty of an abuse of discretion in determining what amount of property was reasonably required for Respondent's purposes (Appendix B).

These findings were contrary to the evidence, as the record clearly discloses that the 10 most valuable acres of the 47 acres sought to be appropriated had never been used by Respondent in connection with its agricultural fair; that the acquisition of said 10 acres was not necessary for the conduct of the agricultural fair;

that Respondent did not intend to use said 10 acres as a part of its site for an agricultural fair; that the acquisition of said 10 acres would constitute an excess appropriation; that Respondent intended to use Petitioners' lands for purposes other than holding an agricultural fair as it had in the past; that Respondent did not have available resources for the payment of the reasonable value of said lands; that Respondent had taken no steps to provide for the payment of any compensation award (R. 117-118); that Respondent possessed no legal authority to provide security or to raise funds in the manner permitted to municipal corporations; that Petitioners' lands had a fair and reasonable value of $250,000; and that Respondent's use of lands having such a great value for a period of only 4 days in each year was not a necessary public use but a ridiculous and unwarranted exercise of the power of eminent domain (R. 100 et seq.).

Because of the serious constitutional questions involved, Petitioners filed both a Motion to Certify the Record and an Appeal as of Right to the Supreme Court of Ohio. The constitutional questions sought to be reviewed were raised by exception to the judgment and decree of the Court of Appeals, which exception was duly noted on the journal entry filed December 10, 1955, (Appendix B), and also by Assignments of Error filed in the Supreme Court of Ohio (R. 11). On February 8, 1956, the Supreme Court of Ohio overruled the Motion to Certify the Record and dismissed the Appeal As of Right. On February 29, 1956, the Supreme Court of Ohio denied Petitioners' Application For Rehearing. (Appendix C)

REASONS FOR GRANTING THE WRIT

I.

The Statute Under Which Respondent Is Seeking to Appropriate Petitioners' Lands Is Unconstitutional

The basic issue in this case is whether Section 1711.14, Ohio Revised Code, deprives Petitioners of their constitutional rights under the Fifth and Fourteenth Amendments to the Constitution of the United States, and Section 19 of Article I of the Constitution of Ohio.

The validity of the appropriating act relied upon by Respondent in this case is questioned on the ground that it makes no provision for just compensation to Petitioners. As this Court said in *Sweet* v. *Rechel*, 159 U.S. 380, 399, 16 S. Ct. 43:

> "When, however, the legislature provides for the actual taking and appropriation of private property for public use, its authority to enact such a regulation rests upon its right of eminent domain—a right vital to the existence and safety of government. *But it is a condition precedent to the exercise of such power that the statute makes provision for reasonable compensation to the owner.*" (Emphasis supplied)

In the above case this Court cited with approval *Haverhill Bridge Props.* v. *Essex County Com'rs.*, 103 Mass. 120, 124, 4 Am. Rep. 518. In that case the court said:

> "The duty of paying an adequate compensation for private property taken is inseparable from the exercise of the right of eminent domain. The act granting the power must provide for compensation, and a ready means of ascertaining the amount. Payment need not precede the seizure;

> *but the means of securing indemnity must be such that the owner will be put to no risk or unreasonable delay.*" (Emphasis supplied)

In the later case of *Brickett* v. *Haverhill Aqueduct Co.*, 142 Mass. 394, 396, the language of the Court was that:

> "A statute which attempts to authorize the appropriation of private property for public uses, without making adequate provision for compensation, is unconstitutional and void."

In view of the above authorities, it is clear that Section 1711.14, Ohio Revised Code, does not make such provision for reasonable compensation as will be adequate and certain in its results as required by Section 19 of Article I of the Constitution of Ohio.

The same principle was adopted by this Court in *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U.S. 641, 658 (34 L. ed. 295, 302), when it said:

> "The Constitution declares that private property shall not be taken 'for public use without just compensation.' It does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. *But the owner is entitled to reasonable, certain and adequate provision before his occupancy is disturbed.*" (Emphasis supplied)

Assuming that the State of Ohio may lawfully delegate by statute the power of eminent domain to political subdivisions of the State and to private corporations, such as Respondent, it is well settled that such statutory delegation of power may not permit the taking of private property for public use without making

adequate provision for the payment of just compensation.

Section 1711.14, Ohio Revised Code, permits a county agricultural society to appropriate a site for the purpose of holding an agricultural fair and it is required, by Sections 719.06 to 719.21, inclusive, Ohio Revised Code, to adopt the same proceedings required of municipal corporations who seek to appropriate private property. However, there exists a great difference between a municipal corporation in the State of Ohio and a private corporation such as Respondent. The municipal corporation has the power to levy taxes and to appropriate money, but no such power is vested in an agricultural society in Ohio. Respondent has neither the power to provide security nor the power to raise funds by the levying of a tax. Its only source of revenue with which to pay a just compensation award is from net receipts derived from the operation of an annual fair and by voluntary allotment from the County Commissioners, which, by statute, is limited to Twenty Thousand ($20,000) Dollars per year (Section 1711.15, Ohio Revised Code).

Any voluntary contributions of more than Twenty Thousand ($20,000) Dollars would require submission of the matter to the qualified electors of the County at a general election at which a majority vote of fifty-five (55%) percent is required for passage (Section 1711.15, Ohio Revised Code). Respondent has no authority to mortgage property or to pledge assets or credit to purchase real estate. The General Assembly of Ohio has never clothed it with power to issue revenue bonds.

While the procedure in appropriation proceedings for a county agricultural society follows that of mu-

nicipal corporations, there is no provision which gives Respondent the right to disregard the plain constitutional limitation on the power of eminent domain, i.e., that private property shall not be taken without just compensation in money. A municipal corporation has general taxing power and a judgment in an appropriation proceeding can be enforced by a writ of execution or by mandamus to compel the levying of a general tax. See *Connecticut River R. Co.* v. *Franklin County Com'rs*, 127 Mass. 50, 52, 56, 34 Am. Rep. 338. No such remedy is available against Respondent. The credit of the municipality is sufficient to guarantee that payment will be made. Respondent cannot give such a guarantee as it is in no different position than any private corporation which is granted the power of eminent domain.

It is axiomatic that a provision for just compensation is indispensable if the power of eminent domain is to be exercised in a constitutional manner. Property owners cannot be made to depend on the doubtful responsibility or the solvency of an agricultural society or its ability to pay just compensation *when the statute under which it seeks to appropriate provides no method for paying just compensation* and where, as in this case, the appropriating entity has no statutory method for raising funds.

The power to appropriate private property is subject not only to the absolute right of the owner to just compensation, but is also subject to the right of the owner to an assurance that adequate provision has been made for the payment of just compensation. This rule has been enunciated in numerous cases. It was followed in the case of *Patchogue* v. *Long Island State Park Commission, et al*, 243 N.Y. 15. In

that case the long Island State Park Commission sought to appropriate lands for public and state park purposes. The Commission did not have on hand the money to pay for the land it sought. In its opinion, the Court stated:

> "It follows inevitably that the power to appropriate lands, as well as to agree on compensation, depends on appropriation of money measurably adequate to justify the Commission to proceed summarily."

The fact that Respondent, although in existence for nearly seventy (70) years, had less than Twenty Thousand ($20,000) Dollars in its treasury at the time it instituted the appropriation proceedings is without dispute. Yet it sought to appropriate lands having an estimated value of Two Hundred Fifty Thousand ($250,000) Dollars and when Petitioners interrogated Respondent's President as to how it would procure the money to pay a compensation award, he refused to state who would contribute or how much might be contributed, and contented himself with the enlightening statement that "it is none of your business". In any event, just compensation cannot be made to depend on voluntary contributions for the reason that they are too uncertain. In re *Manduson*, 51 Fed. 501.

Another case in point is *State Ex Rel Chesterly* v. *Superior Court of Yakima*, 19 Wash. (2d) 791, 144 Pac. (2d) 916. In that case, the State wanted to establish a game sanctuary and an elk refuge, but since the money had not been appropriated for such purposes the proceedings were held to be invalid. In its opinion, the Court said:

> "The legislature has appropriated no funds for the purposes for which the condemnation now be-

fore us were instituted, and we hold that consequently no right existed on the part of the State to initiate the proceedings."

There are many statutes which give to political subdivisions and to private corporations the right to appropriate property, but none give the right to start proceedings unless the property owner can be assured that he will be paid the just compensation to which he is entitled. In the instant case, no such assurance existed and in view of the admitted assets of Respondent, it was fairly apparent from the beginning that Respondent would be unable to pay any reasonable compensation award. Petitioners submit that they should not be put to the expense of an appropriation proceeding only to find that after an award has been made the appropriating authority is unable to pay the award in full.

The rule is well stated by the well known authority *Jahr* in his work on "Eminent Domain" (1953) at section 40:

> "While it is not always necessary in advance of the taking to pay to the owner his compensation, it is necessary that the act provide for a certain and definite and adequate source and manner of payment.
>
> "Thus a statute which authorized the taking of private property for public use must contain a provision, not only for the assessment and collection of just compensation, but also for a definite and certain fund out of which the compensation will be paid." (Page 60)
>
> *and*
>
> "The general responsibility of a private individual or a private corporation does not con-

stitute a certain and adequate provision for compensation. As one of the Courts aptly remarked: 'The property owner cannot be relegated to the doubtful responsibility or solvency of a private corporation or an individual'." (Page 61)

In the case of *Bragg* v. *Yeargin*, 145 Tenn. 643, a school board sought to appropriate land upon which to erect school buildings. The appropriating statute was held unconstitutional because it did not afford the owners a remedy for collection of the amount fixed by the Court. The statute was held to violate both the Tennessee and Federal Constitutions because:

> "* * * No remedy to the landowner is provided by the act for the enforcement or collection of such excess in the event the school boards have not in their hands sufficient funds to pay it."

In the case of *McArthur* v. *Kelly*, 5 Ohio St. 140, 143, the Supreme Court of Ohio stated:

> "Before the owner can, without his consent, be deprived of his land for public use, the legislature must declare by law that the public welfare requires it, (1 B.C. 139) direct the mode of ascertaining its value, and provide for its payment."

The rule has also been stated in the following language:

> "When property is taken for a public use by a private corporation, it is well settled that the right of the owner to obtain and collect a judgment against the corporation by the ordinary processes of law, and subject to risks of insolvency, priority of other claims and the like, is not an adequate provision for compensation no matter how large and prosperous the corporation may be." *Nichols on "Eminent Domain"*, Vol. 3, sec. 8.712.

Petitioners contend that the rule in Ohio as elsewhere is to the effect that a landowner cannot be subjected to an appropriation action unless the appropriating authority is in a position to complete the transaction financially. Section 1711.14, Ohio Revised Code, makes no provision whatever for payment. Neither do the procedural statutes referred to in that section (Sections 719.06 to 719.21, inclusive).

In summary, the enactment of Section 1711.14 alone is not sufficient to authorize appropriation proceedings unless the appropriating authority has the funds available with which to pay a compensation award or unless the appropriating authority has the power to guarantee the payment of an award. In other words, either the ability or the means of payment must be established; otherwise, private property is no longer inviolate and private property may be taken "without just compensation". The sanction given to Respondent's attempted appropriation by the Court below violates the constitutional requirement of just compensation for the taking of private property for public use, and should be corrected by this Court.

II.

The Requirement of Just Compensation Is Not Satisfied in This Case

Under Part I above, we have shown that a provision for compensation in the appropriating act is indispensable and that no such provision is contained in Section 1711.14, Ohio Revised Code. Equally indispensable under constitutional safeguards is the requirement that the appropriating authority must have the money with which to pay a compensation award.

The Respondent's only source of funds with which to pay a compensation award is limited to the money in its treasury and to such money as the County Commissioners of Fayette County may voluntarily allot from the general funds of the County. Neither source is sufficient to assure that the just compensation to be awarded to Petitioners will be paid when assessed by a jury.

The evidence of record clearly discloses that Petitioners' real estate expert (Witness Ben Norris) testified that the land sought to be appropriated had a reasonable market value of Two Hundred Thirty-five Thousand ($235,000) Dollars (R. 195) and that Petitioners had been offered between Two Hundred Twenty-five Thousand ($225,000) and Two Hundred Fifty Thousand ($250,000) Dollars for the property. The evidence also discloses that at the time the appropriation proceeding was instituted by Respondent, it had less than Twenty Thousand ($20,000) Dollars in its treasury (R. 110, 118, 141).

On deposition, Respondent's President (Witness Ray Brandenberg) testified as follows (R. 177 et seq.):

> "Q. Mr. Brandenberg, tell us how you could raise the money?
> Objection by Mr. Brownfield.
> Q. Tell me how much you could raise?
> A. I can't answer that.
> Q. How much are you prepared to pay or how much are you able to pay after a verdict of a jury?
> A. Any reasonable amount.
> Q. How much could you raise to pay a judgment after it is rendered?
> A. Well I don't think I would answer that definitely.
> Q. Could you raise $100,000.00?

A. I think so.

Q. Would you contribute some of the money?

A. I would, and some we could borrow half of it.

Q. Borrow half of it?

A. Yes, we have a little money in the bank.

Q. Less than $20,000.00 in the bank?

A. Yes.

Q. Borrow on the rest?

A. Yes.

Q. Citizens would contribute? You?

A. I don't care to name them. I don't see where it is any of your business who they are. It is none of your business.

Q. Would you expect to give a mortgage on the property?

A. Probably would.

Q. Get some money from the County Commissioners?

A. We would ask them.

Q. Have you ever talked with them about it?

A. Not lately.

Q. You have talked to them?

A. Yes.

Q. They told you they wouldn't contribute one penny?

A. They didn't.

Q. Didn't they tell you that they had no money? Didn't they tell you that?

A. No, they never told me that.

Q. You would expect to get something from them?

A. We would ask them.

Q. Well, if they would give you some, you couldn't get a mortgage?

A. Why can't we?

Q. The law says you can't. It would have to be according to law. In other words, Mr. Brandenberg, you have no arrangements made of any kind to raise the money to pay for this land?

A. I wouldn't say that.

Q. You would have to ask the citizens of the county?

A. I would.

Q. Would you expect to contribute something?

A. That is none of your business.

* * * * *

Q. Mr. Brandenberg, you have declined to answer as to whom you would expect to contribute to this fund, but I will ask you now if you have any definite promises, either oral or in writing from any one specifying amounts such person will contribute to this fund?

A. Orally promises.

Q. From whom?

A. I said before, that is none of your business. Decline to answer.

Q. To what amount would that sum up? What would be the totals of definite promises?

A. I decline to answer that."

In other words, the Respondent did not have sufficient funds on hand to pay a compensation award and had made no arrangements of any kind to raise the needed money (R. 117-118). It proposed to "borrow" and to seek voluntary contributions from members of the community (R. 110, 114, 118, 129, 142). It could not obtain a mortgage on the property which it sought to appropriate because Section 1711.33, Ohio Revised Code, prohibits an agricultural society from encumbering real estate for any purpose other than to pay the cost of necessary repairs and improvements.

The only other source of money would be a limited amount which the County Commissioners of Fayette County would voluntarily contribute from the general funds of the County. Under what circumstances and in what amount may the County Commissioners

appropriate money from its general funds to aid an agricultural society? The answer to this question is contained in Sections 1711.15, 1711.16 and 1711.18, Ohio Revised Code (Appendix D).

Nowhere is there statutory authority enabling the County Commissioners to appropriate money from the general fund to aid an agricultural society to *purchase* real estate. The only financial assistance which Respondent can expect to receive from the County Commissioners is either a contribution to erect or repair buildings *after* Respondent has purchased Petitioners' lands, or a contribution to "pay any other form of indebtedness of said society". Any such contribution is limited by Section 1711.15 to Twenty Thousand ($20,000) Dollars a year and if the same should exceed Twenty Thousand ($20,000) Dollars in any one year, it cannot be made until the question of a levy of the tax therefor is submitted to the qualified electors of the County at a general election at which fifty-five (55%) percent of the vote cast is in favor of such tax.

Assuming, *arguendo*, that the County Commissioners possess statutory authority to assist Repondent in purchasing Petitioners' lands and would like to contribute as much as Twenty Thousand ($20,000) Dollars to accomplish the purchase, nevertheless, the evidence of record discloses that the County had no money in the general fund out of which a contribution could be made. (Witness Clifford R. Hughes, R. 211). Even if the County had sufficient money in its general fund and even if it desired to contribute Twenty Thousand ($20,000) Dollars to aid Respondent in purchasing Petitioners' lands, the total thus available would be

less than Forty Thousand ($40,000) Dollars—clearly insufficient to pay a compensation award.

In the event Respondent hopes to obtain more than Twenty Thousand ($20,000) Dollars from the County Commissioners by way of a contribution, such proposed contribution would have to be submitted to the electors of the County as above stated (R. 212). Such submission to the electors would require a period of at least one year before the electors could pass on the matter (R. 213, Witness Clifford R. Hughes). Even if we assume that the electors voted in favor of such a contribution, Petitioners could not be expected to wait for a period of a year for the just compensation to which they are entitled. As a matter of fact, Section 719.21, Oho Revised Code, recognizes the inequity of requiring a property owner to wait for his just compensation, because it provides that when a *municipal corporation* fails to pay for the property taken within (6) months after the award is made, the right to make the appropriation shall cease and the judgment of the Court shall be void.

The plain fact is that Respondent should either have had sufficient money in its treasury to pay a compensaton award promptly, or it should have obtained a commitment from the County Commissioners to contribute whatever sum was necessary to make payment in full. If a sum greater than Twenty Thousand ($20,000) Dollars was needed as a contribution from the County Commissioners, the matter should have been submitted to the electors before any appropriation proceeding was instituted.

It is inescapable that Respondent had less than Twenty Thousand ($20,000) Dollars in its treasury and could not under any circumstances assure the pay-

ment in full of a compensation award. It fails to meet the indispensable requirement that an appropriating authority must have the money with which to pay a compensation award.

In summary, the constitutional requirement of just compensation cannot be satisfied in this case because Respondent did not have the money to pay a compensation award, had taken no steps to provide for the payment of compensation, and possessed no legal authority to provide security or to raise funds in the manner permitted to municipal corporations. Any sanction of Respondent's attempted appropriation violates Petitioners' constitutional rights and should be corrected by this Court.

III.

Respondent Acted Arbitrarily and in Bad Faith in Seeking to Appropriate Lands in Excess of That Needed for an Agricultural Fair

It is well settled that the necessity and extent of property to be taken by eminent domain is a question for legislative determination and will not be disturbed in the absence of fraud, bad faith or abuse of discretion. *Shepard Paint Co.* v. *Board of Trustees, etc.*, 88 Ohio Apps. 319. It does not follow, however, that Respondent can claim a need for more land than is reasonably necessary for the purpose of conducting an agricultural fair. The extent of the property which Respondent seeks to appropriate must bear a reasonable relationship to its needs. In other words, it cannot seek to appropriate 47 or 57 acres of land when 37 acres of land will suffice for its purposes. Section 1711.14, Ohio Revised Code, does not give a blank check to an agricultural society to appropriate lands far in excess of its reasonable needs. It is proper, therefore,

to inquire as to what are the precise needs of Respondent.

At the time Respondent instituted the appropriation proceeding, it conducted annually a 4-day agricultural fair on a leased site near Washington Court House, Ohio, containing approximately 47 acres of which 10 acres was used for parking purposes. It now seeks to appropriate for title 37 of the original 47 leased acres and an additional 10 acres valued in excess of Sixty Thousand ($60,000) Dollars which had never previously been used by it. If it succeeds in its purpose, it will have a site consisting of 57 acres, 47 acres of which it will own and 10 acres of which it will possess under a lease from the County Commissioners expiring January 1, 1971.

Petitioners contend that the additional 10 acres not heretofore a part of the site or used in connection with the agricultural fair is not necessary for the conduct of the agricultural fair, but constitutes an attempt to make an unjustified excess appropriation. It was not necessary for Respondent's purposes in the past and no showing has been made that it will be necessary for such purposes in the foreseable future. The obvious, although not admitted purpose, of Respondent in seeking to acquire for the first time the additional 10 acres is to take advantage of the land's rapidly increasing value attributable to the fact that Washington Court House is a growing community and is spreading around and beyond the fair site. In view of the fact that Respondent has no valid need for the additional 10 acre tract, it is not unfair to conclude that in the event it succeeds in acquiring the same, it will sell or lease the same for commercial purposes at a profit. The appropriating act does not give

Respondent the right to acquire land either for the purpose of speculative resale or for the purpose of acquiring rental income property, but *only* "for the purpose of holding an agricultural fair".

Nowhere in the record of this case does it appear that the additional 10 acres is necessary for the purpose of holding an agricultural fair. Petitioners may well ask—can Respondent exercise its delegated power to appropriate lands in excess of that needed? Or is such attempted excess appropriation an abuse of discretion and the result of an arbitrary determination made in bad faith?

The question as to whether Respondent has a need for the additional 10 acre tract is largely a question of fact. The fact that the Respondent has conducted the agricultural fair without any previous alleged need for the additional 10 acre tract and without seeking to lease the same for parking or other purposes, *plus* the further fact that the Commissioners of Fayette County, in negotiating the 20 year lease covering the 37 acres, did not seek to have the additional 10 acre tract in question included under the lease but took another 10 acre tract which Respondent is *not* seeking to appropriate, *plus* the further fact that Respondent, as late as December 26, 1950, expressly excepted the additional 10 acre tract in question from the land it sought to appropriate (R. 205-207), fairly and reasonably supports the conclusion that the additional 10 acre tract is not necessary for Respondent's purpose "of holding an agricultural fair", but constitutes an arbitrary determination reached in bad faith.

In summary, an appropriating authority has no right to arbitrarily appropriate lands in excess of that needed for the purposes defined in the appropriating

act. Any sanction of Respondent's attempted appropriation of lands in excess of that reasonably needed for use as an agricultural fair violates Petitioners' constitutional rights and should be corrected by this Court.

IV.

Respondent Has Failed to Establish a Necessary Public Use

It is well settled by numerous decisions in this Court and in Ohio that the power conferred upon an appropriating authority to take private property for public use must be strictly followed. The limitations on the exercise of this power are well established. The basic question is whether the use for which the land is appropriated is a *necessary* public use. The determination of this question is essentially a judicial matter. In other words, the legislative authority may determine the extent and the need to take private property, but whether the use to which the property is to be put is a public necessity is a question for the courts.

In the case of *Hairston* v. *Danville Western Railroad Co.*, 208 U.S. 598, this Court stated:

> "When we come to consider what are public uses for which the right of compulsory taking may be employed, and what are private uses for which the right is forbidden we find no agreement either in reason or in conclusion. The one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question."

In the case of *Cincinnati* v. *Vester*, 281 U.S. 439, 446, Chief Justice Hughes, speaking for the Court, said:

> "It is well established that in considering the application of the Fourteenth Amendment to cases

> of expropriation of private property, the question what is a public use is a judicial one. In deciding such a question, the Court has appropriate regard to the diversity of local conditions and considers with great respect legislative declarations and in particular the judgments of state courts as to the uses considered to be public in the light of local exigencies. But the question remains a judicial one which this Court must decide in performing its duty of enforcing the provisions of the Federal Constitution."

In the case of *Sargeant* v. *City of Cincinnati*, 110 O.S. 444, the Court in its opinion employed the following language:

> "All these legislative functions relate to the necessity and exigency of the taking, but owners of private property may judicially inquire whether the specified use is a public use."

Petitioners contend that the proposed use of their lands as a site for an agricultural fair held during only 4 days of each year is not such a necessary public use as will justify its appropriation and therefore they are entitled to the injunctive relief which they seek.

It must be remembered that the Appropriating Act (Section 1711.14, Ohio Revised Code) only permits Respondent to procure a site for the purpose of holding an agricultural fair. The Court of Appeals in its opinion (Appendix B), however, departed from the language of Section 1711.14. It found that the lands sought to be appropriated were for a necessary public use because they "are needed for many public activities of defendant, including programs for 4-H Clubs for boys and girls; Junior and Senior department FHA and FFA; Exhibits sponsored by Garden Clubs;

Health Groups; Farm Bureau; Grange and State Highway Department; also exhibits of livestock, grain, fruit, sewing, canning, cooking and other public uses."

However praiseworthy these uses may be, they certainly do not qualify as *necessary* public uses, especially in view of the fact that Respondent is a private corporation organized for profit and not a political subdivision of the State of Ohio.

The mere fact that Respondent may be performing a useful semi-public function does not establish it as a public body. In the case of *Dunn* v. *Agricultural Society*, 40 O.S. 93, the Court stated that the purpose of such a society may be public "but only in the sense that they are designed for the accomplishment of some public good", and it was pointed out "in that sense all private corporations are for a public purpose, inasmuch as such public benefit is both a consideration and justification for the special privileges and franchises conferred upon them."

In determining whether the proposed use of Petitioners' lands is a *necessary* public use, the only use that may be considered is the use of the land as a site for an agricultural fair.

The Courts below found that Petitioners' lands would be used only 4 days in each year for an agricultural fair. Is this a necessary public use which will permit the taking of private property without the consent of the owner? Petitioners hold, as did the Court of Common Pleas below, that such use of their property is not a necessary public use and any contrary holding will destroy the inviolability of private property guaranteed by Section 19 of Article I of the Ohio Constitution. It is inconceivable to Petitioners, as it

was to the Court of Common Pleas below, that the use of property having an estimated value of $250,000 for the purpose of a county fair for a period of only 4 days in the year can be said to be such a necessary public use as to require Petitioners to surrender their property when it is their desire not to do so.

In summary, the Court of Appeals below, avoided passing upon the question of whether the use of land worth $250,000 as a site for an agricultural fair conducted only during 4 days in each year was a necessary public use. It erroneously confused Respondent's "public activities" with "necessary public use". The sanction given to Respondent's attempted appropriation by the Court below violates Petitioners' constitutional rights and should be corrected by this Court.

CONCLUSION

The instant case presents squarely to this Court the question of whether a state statute which attempts to authorize a county agricultural society to take private property for public use but fails to make adequate provision for the payment of just compensation to the property owner is thereby unconstitutional and void.

If a county agricultural society, acting pursuant to a statute authorizing it to take private property, is permitted to appropriate lands without the property owner being assured that reasonable, certain and adequate provision for payment of just compensation has been made or that he will be put to no risk or unreasonable delay in obtaining just compensation, then the guarantees of the Federal and State Constitutions will be destroyed and the security of private property in this country will no longer be "inviolate".

In any event, this Court should determine that the constitutional requirement of just compensation cannot be satisfied in this case because Respondent had no money with which to pay a compensation award and had no legal authority to provide security or to raise funds in the manner permitted to municipal corporations.

Moreover, this Court should determine that Respondent has failed to establish that the lands which it seeks to appropriate were for a necessary public use. It is respectfully suggested this Court should determine whether a state court by the mere use of the magic words "public use", without substantial basis, may curtail important constitutional rights. Should this Court determine that appropriating valuable property usable for commercial and residential purposes for use as an agricultural fair during only 4 days in each year is a necessary public use, then the Court should determine that Respondent's attempted appropriation of more lands than it reasonably needs for its purposes constitutes an act of bad faith and an abuse of discretion.

If the decision of the Ohio Court of Appeals is permitted to stand in view of the facts set forth herein, then the constitutional rights of all property owners will be irreparably impaired.

WHEREFORE, Petitioners pray that this Petition for writ of certiorari be granted to the end that the judg-

ment and decree of the Court of Appeals, Fayette County, Ohio, may be reversed by this Court.

Respectfully submitted,

CHARLES G. WHITE
FORREST E. ELY
HAROLD A. KERTZ
LUCIEN H. MERCIER
Counsel for Petitioners

MERCIER, KERTZ, SANDERS & BAKER
ELY, WHITE & DAVIDSON
Of Counsel

APPENDIX A

COURT OF COMMON PLEAS,
FAYETTE COUNTY, OHIO.

No. 21573

Filed, May 29, 1954

EARL LEROY SCOTT and ESTHER SCOTT CRONE, *Plaintiffs*,

vs.

THE FAYETTE COUNTY AGRICULTURAL SOCIETY, *Defendant*.

SCHNEIDER, J.:

Plaintiffs are the owners of real estate located in Fayette County. Defendant is a private corporation operating as a County Agricultural Society, under the provisions of General Code 9880 (Revised Code 1711.01) et seq. Defendant filed an action in this Court on the 13th day of February, 1953, being Cause No. 21573 to appropriate by condemnation lands of plaintiffs totaling 47.033 acres for the uses of defendant society. In the instant action plaintiffs seek to enjoin defendant permanently from proceeding with said appropriation action. The matter is before the Court on the amended petition of plaintiffs, the answer of defendant corporation and the evidence.

The petition sets forth twenty causes of action. The seventh cause was voluntarily withdrawn, the thirteenth cause has been previously disposed of by decision of the Court of Appeals and the nineteenth and twentieth causes of action seek declaratory judgment, which the Court is of the opinion are out of order in this proceeding.

Counsel for both sides have filed learned and exhaustive briefs on the issues raised and the Court has examined all of the authorities presented in these briefs. The Court will

briefly state its conclusions as to the various issues as follows:

First Cause of Action. The evidence is sufficient to show a bona fide effort on the part of defendant society to reach an agreement with plaintiffs.

Second Cause of Action. Whether Herbert Wilson is or is not an interested party is not relevant in the instant cause.

Third, Ninth, Tenth and Sixteenth Causes of Action. Whether or not all of the premises sought to be appropriated are intended or necessary to be used for the purposes of the society is irrelevant, inasmuch as it is within the power and authority of the appropriating body to determine the extent and the necessity of the property sought to be taken.

Fourth Cause of Action. The evidence herein does not remotely support the allegations of this cause of action.

Fifth, Sixth and Fifteenth Causes of Action. The evidence supports in the main, and the defendants in effect admit the allegations. However, these facts are not relevant inasmuch as it is not denied by plaintiffs that these activities do not in any way interfere with the holding of an annual agricultural fair which is the primary purpose and objective of the defendant corporation.

Eleventh Cause of Action. The Court is of the opinion that the right of Eminent Domain is the right of the sovereign State or any of its subdivisions, or of any individual or body corporate to whom such power is properly delegated by statute, to acquire ownership of any given real estate which such authority has determined is required and necessary for its particular purpose, absolutely and completely in fee simple, regardless of any other claims thereon, provided, of course, that adequate compensation is assured to all parties in interest.

TWELFTH CAUSE OF ACTION. It should be sufficient to observe that the only property sought to be appropriated is that described by defendant in the petition of appropriation.

FOURTEENTH CAUSE OF ACTION. Whether or not petitioner in the appropriation action has sufficient resources or funds available to pay for the property sought to be appropriated, or how or from what source funds are to be obtained to provide the necessary compensation to the property owners, is not relevant in this action.

SEVENTEENTH CAUSE OF ACTION. The Court is unable to agree with counsel for plaintiffs that all necessary owners are not included as adverse parties in Case No. 21553.

EIGHTH AND EIGHTEENTH CAUSES OF ACTION. The appropriation by defendant corporation is sought under the provisions of Section 9885-1 General Code (1711.14 Revised Code), which section was first enacted, effective September 26, 1949. Prior to that time there was no grant of authority for such appropriation for Fair Ground purposes and so far as the Court has been informed or has been able to find, there has been no decision of any Court with respect to the constitutionality of this legislation or of any attempted action by any Fair Board Society thereunder.

Assuming the right in the Legislature to delegate or grant the power of Eminent Domain to political subdivisions of the State, to various public officials or boards, and to private corporations including the defendant herein, it does not follow that such legislation confers unlimited or unrestricted power to appropriate land. The limitations on the exercise of this power are pretty well established and clearly set forth in numerous decisions, both in our own State and of the Supreme Court of the United States. Some of these cases have been cited by counsel herein.

The language of the Supreme Court of the United States is succinct in *Hairston* v. *Danville & Western Railway Company*, 208 U. S. 598:

> "When we come to inquire what are public uses for which the right of compulsory taking may be employed, and what are private uses for which the right is forbidden we find no agreement either in reasoning or conclusion. The one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question."

In the case of *Sears, Trustee* v. *City of Akron*, 246 U. S. 242, it is stated:

> "While the question of whether the *purpose* of the taking is a public one is judicial, the necessity for and proper extent of the taking is a legislative question."

In the case of *Sargeant* v. *City of Cincinnati*, 110 O. S. 444, the opinion of the Court uses this language:

> "All these legislative functions relate to the necessity and exigency of the taking, but owners of private property may judicially inquire whether the specified use is a public use."

This principle, namely, that the question of whether the use for which it is sought to appropriate private real estate is a necessary public use is essentially and finally a judicial question, is thus definitely established. In other words, the legislative authority may determine the necessity and the extent of the need of private property, this being a legislative or political question, but whether the use to which said property is to be put is a public necessity so as to justify the taking of private land and depriving the owner of his free use thereof and his right to hold it inviolate, is a question for the Courts.

Though it is not necessary in the instant case to pass upon the right of the Legislature to delegate the power of Eminent Domain to a private body or corporation such as defendant herein, it might not be presumptuous to suggest that a delegation of this power to a private corporation or society whose members are not answerable to the

citizens in any way and are not required to take the oath which is required of all public servants, both elected and appointed, but who are authorized to expend public funds, could well be considered a misuse of the legislative power. This is not to suggest in any way a reflection upon the many fine citizens who serve as members of such boards and societies. The observation relates solely to the policy and principle of delegating governmental or legislative power.

The mere fact that such corporation or society is admittedly performing a fine and useful public function does not establish it as a public body or public service authority. In the case of *Dunn* v. *Agricultural Society* 46 O. S. 93, it is said that the purpose of such a society may be public "but only in the sense that they are designed for the accomplishment of some public good" and it is pointed out "in that sense all private corporations are for a public purpose, inasmuch as such public benefit is both the consideration and justification for the special privileges and franchises conferred upon them". By this reasoning, it would be just as logical for the Legislature to delegate to any or all private corporations this power of Eminent Domain.

However, granting that defendant herein does have the power to appropriate the land of plaintiffs by virtue of the statute hereinbefore referred to, if the use for which the property is sought is a necessary public use, then plaintiffs must fail in this action. If the use is not a necessary public use, plaintiffs are entitled to the relief prayed for under the guarantees of Section 19 Article I of the Constitution of our State that private property shall ever be held inviolate, subservient only to the public welfare.

It is conceded that the property would be used but four days in each year for a county fair, the activities of which are only vaguely described or defined by the evidence. The desirability and value of such activities are not in

doubt and unquestionably fully justify the expenditure of public funds as established by the case of *State ex rel Leaverton* v. *Kerns*, 104 O. S. 550, and the granting of financial assistance from public funds to such an enterprise is not in violation of Sections 4 and 6 of Article VIII of our Constitution. However, that case does determine the authority of such a society to appropriate private property under the provisions of Section 19 of Article I.

It is inconceivable to this Court that the use of the property of plaintiffs for the purposes of a county fair for a period of four days in the year can be said to be such a necessary public use as to require private owners of land to forfeit the same when their desire is not to do so, whatever the motive may be. The fact that it must be presumed that they would be adequately compensated under appropriation proceedings provided by the law, is not a satisfactory answer. For instance, it may well be the desire of the property owners to retain the property for a period of years with the expectation that its value would greatly enhance in the future to their profit, and there may be many other reasons, sentimental and otherwise, why the owners would desire to retain their property.

The Court is led to the conclusion that plaintiffs are entitled to the relief prayed for, permanently enjoining the defendant from proceeding in Cause No. 21573 now pending in this Court, and an entry may be prepared in accordance with the finding.

* * * * *

Appearances:

Carrington T. Marshall
and Frederick L. Orum,
Attorneys for Plaintiffs.

Brownfield, Ford & Douglas,
Attorneys for Defendant.

May 26, 1954.

APPENDIX B

IN THE COURT OF APPEALS
FAYETTE COUNTY, OHIO

No. 276

EARL LEROY SCOTT, ET AL., *Plaintiffs-Appellees,*

HERBERT B. NUSHAWG, *Intervening Plaintiff-Appellant,*

v.

THE FAYETTE COUNTY AGRICULTURAL SOCIETY,
Defendant-Appellant.

Opinion

Rendered on the 19th day of November, 1955

Appearances:

Hon. Carrington T. Marshall and Mr. Frederick L. Orum, 218 Parkview, Columbus, Ohio
For Plaintiffs-Appellees.
Brownfield & Malone, West Broad Street, Columbus, Ohio.
For Defendant-Appellant.

CONN, J., of the Sixth District, sitting by designation.

This appeal is on questions of law and fact from a judgment entered in the Common Pleas Court to this court for trial de novo.

It was stipulated by counsel for the parties that the case here shall be heard on the transcript of the evidence received in the Common Pleas Court, and such additional evidence as may be taken by deposition. The parties will be designated herein as in the lower court.

This cause was submitted on the amended petition of plaintiffs, the intervening petition of Herbert B. Nushawg, the answer of defendant, transcript of the docket and journal entries, transcript of the evidence and depositions and briefs of counsel.

This is an action for injunctive relief originally brought and in the Court of Common Pleas, to restrain the defendant from further proceeding in an action previously brought by defendant in the Common Pleas Court, cause No. 21553, to appropriate certain lands of plaintiffs, particularly described in plaintiffs' petition filed in this cause. Plaintiffs also pray for a declaratory judgment.

The amended petition of plaintiffs, as pleaded, contains twenty causes of action. Under the Code of Civil Procedure (Sec. 2309.07, R. C.) where a petition contains more than one cause of action, each must be separately stated and numbered.

A cause of action in properly designated as such in a pleading where the facts alleged, and if established, provide a basis for judicial relief. The fact that the relief prayed for is predicated on plural grounds, does not give rise to separate causes of action.

Where a single cause of action is split into two or more counts, there is a dearth of clarity and conciseness, which are elements of good pleading under the Code, and provides a well-designed way to confusion. Furthermore, this form of pleading tends to impose an added burden on the court in applying the evidence and adjudicating the issues, and is not in harmony with modern procedure, and is not approved.

The confusion created by the several causes of action set up in plaintiffs' amended petition, is illustrated by the form of the judgment entry in the lower court and the nature of appeal of defendant, specifically limited as an appeal from the judgment of the trial court on allegations in the 8th and 18th causes of action; likewise by the cross appeal of plaintiffs from the adverse judgment of the Court of Common Pleas on the 1st to the 17th causes of action, excepting the 8th.

In our opinion, the appeal of defendant, not being challenged, brings up the whole case to this court for trial

de novo, and that the specific limitation in the notice of appeal of defendant, and the cross appeal filed by plaintiffs, as to certain "causes of action," effect no limitation as to the jurisdiction of this court to conduct a trial de novo.

We call attention to the provisions in Sec. 2505.21, R.C.:

> "An appeal taken on questions of law and fact entitles the party to a hearing and determination of the facts de novo, which shall be upon the same or amended pleadings."

An analysis of plaintiff's amended petition discloses that it contains but two causes of action, one for injunctive relief and the other, for a declaratory judgment, and sua sponte shall be so considered.

The material allegations in the amended petition, which provides a basis for relief, as prayed for, are as follows:

That on February 13, 1953, the defendant filed its petition in the Court of Common Pleas, cause No. 21553, to appropriate certain lands of plaintiffs, situated in Fayette County, consisting of two parcels, described by metes and bounds, one parcel containing 47.033 acres and the other containing two-tenths of an acre; that said parcels are not correctly described in said application of defendant; that no bona fide effort was made to agree with the owner of said first parcel upon a price for or the right to use the second parcel, for an agriculture fair; that in said appropriation proceedings one, Wilson, is made a party and claims some interest, but has no interest in said real estate.

Plaintiffs further aver that a large portion of the premises to be appropriated is not intended to be used for an agriculture fair; that large portions of said lands have been used for purposes other than an agriculture fair and if said lands should be appropriated, defendants intend to use same for private uses; that defendants intend to acquire said lands for resale at a profit; that for many

years defendants have used said premises for many purposes other than holding an agriculture fair,—such as stock sales, horse shows and sales,—said uses were not being public uses but for the purpose of making profit.

Plaintiffs further say that defendant is a private corporation for profit and does not have the power nor right to own real estate; that under the statutes of Ohio, the defendant can acquire lands for the sole purpose of holding an agriculture fair; that the use of land for an agriculture fair is not a public use as contemplated in Sec. 19 of the Ohio Bill of Rights and the 5th amendment of the Constitution of the United States; that therefore the statute attempting to confer the power of eminent domain is unconstitutional and void.

It is further alleged that defendants are already in possession of real estate, excepting a small parcel along Fairview Avenue, by reason of a lease from the county commissioners; that county commissioners are obligated by said lease until January 1, 1971, and said property is used for purposes intended; that defendant does not have available resources for paying the reasonable value of said property; that defendant has permitted pari-mutuel gambling on said premises; that there is a defect of parties and that defendant will seek to appropriate said lands unless restrained by this court; and that plaintiffs have no adequate remedy at law. Plaintiffs pray that defendant be enjoined from proceeding further to procure said lands.

Plaintiffs further allege that defendant has held a leasehold interest in said premises beginning August 25, 1885; that under the terms of certain leases, defendant had the right to remove the buildings and improvements thereon within a given time; that defendant did not remove any of said buildings or improvements at any time prior to May 1, 1950; that the right to remove them ceased on said date; that notwithstanding the provisions in each of said leases, defendant claims ownership of all buildings and

improvements on said premises and prays for a declaratory judgment in event the prayer for injunction is denied.

For answer to the amended petition, defendant admits the filing of said appropriation proceedings; that it has permitted stock sales, horse shows and horse sales on said premises; that it held fairs for the years 1951, 1952 and 1953 on a portion of said lands under lease from the county commissioners; that it has permitted pari-mutuel wagering pursuant to the statutes of Ohio; that plaintiffs gave a lease to the county commissioners from January 1, 1951 to January 1, 1971; and that defendant is a body corporate and politic under the laws of Ohio. Defendant denies generally each and all allegations in the amended petition not herein admitted, and prays that the amended petition be dismissed.

In the intervening petition of Herbert B. Nushawg it is alleged that said petitioner on February 5, 1953, acquired by warranty deed from plaintiffs the land described in parcel 2 of the amended petition; that prior to February 13, 1953, he entered into a contract with plaintiffs to purchase an additional parcel facing U. S. Highway No. 22; that no effort has been made by defendants to agree on a price for said property; and that the land owned by him is not intended to be used by defendants for holding an agriculture fair. Said petitioner prays defendant be enjoined from proceeding further to appropriate his lands.

Defendants admits the execution and delivery of said warranty deed and denies generally all allegations not admitted.

Plaintiffs have the burden of establishing the allegations of their amended petition which are essential as grounds for injunctive relief.

The rule is stated concisely in 21 O. J., 1277, Sec. 202, which we quote in part;

> "The burden is upon one who seeks to enjoin the action of a public board in the exercise of its discretion, to

> show with that clearness which is always necessary to move a court of equity to interfere, a state of facts which would constitute an abuse of discretion."

The weight and sufficiency of evidence necessary to support a prayer for injunction is expressed in such terms as "clear", "clear and convincing" or "satisfactory".

> 21 O. J., 1280, Sec. 204;
> See Wen v. Board of Trustees, etc.,
> 21 Ohio App., 367;
> White v. City of Columbus, 27 Abs., 489.

Briefly stated, plaintiffs must sustain the several fact issues raised on the amended petition, intervening petition and answers, by clear and convincing evidence.

The action to appropriate the lands described in plaintiffs amended petition was begun by defendant pursuant to the provisions of Sec. 9885-1, G. C. (now 1711.14 R. C.) which are as follows;

> "Appropriation of land for agricultural fair purposes; procedure. When it is necessary in the opinion of any county agricultural society to procure or enlarge any site for the purpose of holding an agricultural fair, and the agricultural society and the owner of the property needed for such purposes, are unable to agree upon the sale and purchase thereof, the agricultural society shall make an accurate plat and description of the parcel of land which it desires for such purposes, and file them with the probate judge, or with the court of common pleas in the county in which the land sought to be taken is located. Thereupon the same proceedings of appropriations shall be had which are provided for the appropriation of private property by municipal corporations in sections 3681 to 3697, both inclusive, of the General Code."

This court held, on the first appeal of this case, 96 Ohio App., 6, that said Sec. 9885-1 and Sections 3681 to 3697, of the General Code, are in pari materia. These latter

sections are found in Chapter 1 of the General Code, "Appropriation of Property" by municipal corporations.

It was held on this first appeal that the Agricultural Fair Society, defendant herein, had complied with the requirements of the above statutes with respect to notice and the correct description of the property and plat of said lands, filed simultaneously therewith.

Plaintiffs claim again on this appeal that the statutes with respect to the description of the property and the plat were not complied with. This contention is without merit. It was made on the previous appeal to this court and not sustained. That judgment has become final, as no appeal was taken.

The evidence received on the claims of plaintiffs that no bona fide effort was made by defendant to agree with the owners upon a price for said pracels of land does not sustain plaintiffs' claim. It appears that the parties authorized their respective counsel to negotiate for the sale and purchase of said lands and that these negotiations were carried on for approximately one year, during which time plaintiffs put a price on said lands and defendants made a counter offer. The parties not being able to agree, defendant notified plaintiffs that an application to appropriate the lands would presently be filed, then, within a few days before said application was filed, plaintiffs conveyed parcel two by warranty deed to the intervening petitioner, and conditionally agreed to convey a second parcel, although intervening petitioner knew of the negotiations between the parties and knew that defendant intended to commence appropriation proceedings.

The situation thus presented subjects plaintiffs to the equitable doctrine that he who seeks equity must do equity. The advantage sought by plaintiffs in these doubtful transactions had no standing in a court of equity.

Respecting the same claim made by the intervening petitioner it is apparent that his rights can rise no higher

than plaintiffs' under the facts and circumstances disclosed by the record. In our opinion, the defendant was not required to conduct further negotiations as a condition precedent to filing its application for appropriation of said property.

Further fact issues were raised that certain portions of said described property are not necessary for purpose of agriculture fair and defendants did not intend to use them for that purpose, and had no right to appropriate same; that defendant had used said premises for many purposes other than holding an agriculture fair; that the use of said property by defendant was not a public use; that defendant was a private corporation and had no right to appropriate said lands; and that defendant did not have available resources for the payment of the reasonable value of said premises.

On these issues, the president and secretary of defendant, and other witnesses, were called to testify. The president testified very fully, among other things, as to the need and use of all the lands described in plaintiffs' amended petition for the purposes of defendant, including land for improvements, parking, etc., and to meet generally the public use of all the lands sought to be appropriated, together with all the numerous public activities of defendant, culminating in the annual fair.

The evidence adduced shows that defendant has held annual fairs for many years in Fayette County; that in addition to holding fairs, the lands sought to be appropriated are needed for many public activities of defendant, including programs for 4-H Clubs for boys and girls; Junior and Senior department FHA and FFA; Exhibits sponsored by Garden Clubs; Health Groups, Farm Bureau; Grange and State Highway Department; also exhibits of livestock, grain, fruit, sewing, canning, cooking and other public ases.

Said officers were also examined fully as to ways and means defendant has to provide funds with which to pay for the reasonable value of said premises. No testimony was offered tending to show that defendant would be unable to pay the amount of the assessed valuation. Said witnesses were not impeached and little or no evidence was offered, of an affirmative character, which was materially conflicting or which tended to show a want of good faith in seeking to appropriate the lands of plaintiffs for the public uses of an agriculture fair grounds for Fayette County.

Moreover, there was no showing that the defendant has acted arbitrarily or had been guilty of an abuse of discretion in determining what amount of property is reasonably required for its public use and purposes or in the management of its property in relation to the general public, or in the use it has made or intends to make of the property it seeks to appropriate for the uses and purposes of the defendant as an agriculture fair society.

There being no showing of bad faith or abuse of discretion on the part of the defendant in making application to appropriate plaintiffs' property for public use, the rule announced by this court in Shepard Paint Co. v. Board of Trustees, etc., 88 Ohio App., 319, has application here. We quote:

> "4. The necessity for and extent of property to be taken by eminent domain are questions for legislative determination, and, in the absence of fraud, bad faith or abuse of discretion, such determination will not be disturbed by the courts."
> See Geisey v. Cincinnati, 4 Ohio St., 308.

On the cause of action for a declaratory judgment on the issue of ownership of the buildings and improvements on said property, and the right to remove same, under the terms of the several leases, the first lease of defendant, bearing date August 25, 1885, there is a great dearth of

evidence in the record in support of the prayer for a declaratory judgment.

The several leases referred to were not identified or introduced and no evidence of probative value was offered upon which a declaratory judgment could rest.

On the state of the record, we conclude that the prayer for declaratory judgment may not be granted.

In conclusion, there should be a finding and judgment for defendant, as it appears on the whole record that the several steps taken by defendant to appropriate the property of plaintiffs for the public uses of an agriculture fair society, have been pursuant to the statutes made and provided in such cases and further that plaintiffs have an adequate remedy at law.

The petition of plaintiffs and the intervening petition of Herbert B. Nushawg are each dismissed at costs of plaintiff, and cause remanded to the Court of Common Pleas for execution for costs.

MILLER, P. J. and HORNBECK, J. concur.

COURT OF APPEALS, FAYETTE CONTY, OHIO

Filed December 10, 1955

No. 276

EARL LEROY SCOTT and ESTHER SCOTT CRONE,
Plaintiff-Appellants

and

HERBERT B. NUSHAWG, *Intervening Plaintiff-Appellant*

v.

THE FAYETTE COUNTY AGRICULTURAL SOCIETY,
Defendant-Appellant

Journal Entry

The parties appeared by their attorneys and this cause came on to be heard de novo upon appeal on questions

of law and fact, and, by stipulation of the parties, on the Amended Petition of Plaintiffs, the Intervening Petition of Herbert B. Nushawg, the Answers thereto of Defendant, the transcript of the docket and journal entries and the transcript of the evidence in Cause No. 21573 in the Court of Common Pleas of Fayette County, Ohio, the depositions taken as additional evidence, and the briefs and was submitted to the Court.

Upon consideration whereof, the Court finds in favor of Defendant The Fayette County Agricultural Society on all of the issues raised on the Amended Petition of Plaintiffs and the Intervening Petition of Herbert B. Nushawg.

It is therefore ordered, adjudged and decreed that the Amended Petition of Plaintiffs and the Intervening Petition of Herbert B. Nushawg be, and the same hereby are, dismissed at the costs of Plaintiffs.

It is further ordered that the said Plaintiffs pay the costs of this action in this Court and the court below taxed at $, and, in default thereof, that an execution issue therefor, and that a special mandate be sent to the Court of Common Pleas of Fayette County, Ohio, to carry this judgment into effect and execution. To all of which Plaintiffs and Herbert B. Nushawg except.

FRED J. MILLER, P. J.
ROSCOE G. HORNBECK, J.
AMOS L. CONN, J.

Approved:

BROWNFIELD & MALONE
Attorneys for Defendant

APPENDIX C

THE SUPREME COURT OF OHIO

Case No. 34687

EARL LEROY SCOTT, ESTHER SCOTT CRONE and HERBERT NUSHAWG, *Plaintiffs-Appellants;*

HARRY D. CRONE, Executor of the Estate of ESTHER SCOTT CRONE, Deceased, *New Party Appellant,*

v.

THE FAYETTE COUNTY AGRICULTURAL SOCIETY, *Defendant-Appellee.*

Journal Entries

Wednesday, February 8, 1956

34687

Motion for an order directing the Court of Appeals of Fayette County to certify its record.

It is ordered by the Court that this motion be, and the same hereby is, overruled.
J. 41—P. 686

Wednesday, February 8, 1956
34687

Motion by appellee to dismiss appeal as of right.

It is ordered by the Court that this motion be, and the same hereby is, sustained.

J. 41—P. 686

Wednesday, February 8, 1956
34687

Appeal from the Court of Appeals of Fayette County.

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Fayette County,

upon the motion of the appellee to dismiss the appeal, filed as of right herein, and was argued by counsel.

On consideration whereof, it is ordered and adjudged that said appeal be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause.

It is further ordered and adjudged that the appellee recover from the appellants its costs herein expended, taxed at $ .....

Ordered, That a special mandate be sent the Court of Appeals of Fayette County, to carry this judgment into Execution.

J. 41—P. 687-88

Wednesday, February 29, 1956
34687

Rehearing Docket.

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and it is hereby, denied.

J. 42—P. 2

Monday, April 30, 1956
34687

Entry.

This cause came on to be heard on the motion of Harry D. Crone, Executor of the Estate of Esther E. Crone, aka Esther Scott Crone, calling the attention to the Court of the fact that Esther E. Crone, aka Esther Scott Crone, died on April 10, 1956, and that he was on April 25, 1956, duly appointed Executor of the Estate and under the will of Esther E. Crone, aka Esther Scott Crone, by the Probate Court of Fayette County, Ohio.

And the Court, upon due consideration thereof, finds

that this action is one that survives the former plaintiff-appellant, Esther Scott Crone, and therefore should be revived and continued under the name of Harry D. Crone, Executor of the Estate of Esther E. Crone, aka Esther Scott Crone, deceased, and that this action should in all respects proceed and otherwise be the same as if said Esther Scott Crone were now living. Carl V. Weygandt, Chief Justice.

J. 42—P. 47

APPENDIX D

STATUTORY PROVISIONS

Ohio Revised Code, Section 719.06

"The solicitor of a municipal corporation shall, upon the passage of an appropriation ordinance under section 719.05 of the Revised Code, make application to the court of common pleas or to a judge in vacation, or to the probate court in the county in which the land sought to be taken is located, which application shall describe, as correctly as possible, the land to be appropriated, the interest or estate therein to be taken, the object proposed, and the name of the owner of each lot or parcel thereof."

Ohio Revised Code, Section 719.21

"When a municipal corporation makes an appropriation of property, and fails to pay for or take possession of such property within six months after the assessment of compensation is made, its right to make such appropriation on the terms of the assessment so made shall cease, and lands so appropriated shall be relieved from all encumbrance on account of any of the proceedings in such case, and the judgment or order of the court directing such assessment to be paid shall be void, except as to the costs adjudged against the municipal corporation. Upon the motion of any defendant, such costs may be retaxed, and a reasonable attorney's fee paid to the attorney of such defendant,

which, together with any other proper expenses incurred by the defendant, may be included in the costs."

Ohio Revised Code, Section 1711.14

"When it is necessary in the opinion of any county agricultural society to procure or enlarge any site for the purpose of holding an agricultural fair, and the society and the owner of the property needed for such purposes are unable to agree upon the sale and purchase thereof, the society shall make an accurate plat and description of the parcel of land which it desires for such purposes, and file them with the probate judge, or with the court of common pleas in the county in which the land sought to be taken is located. Thereupon the same proceedings of appropriations shall be had which are provided for in sections 719.06 to 719.21, inclusive, of the Revised Code."

Ohio Revised Code, Section 1711.15

"In any county in which there is a duly organized county agricultural society, the board of county commissioners may purchase or lease, for a term of not less than twenty years, real estate on which to hold fairs under the management and control of the county agricultural society, and may erect thereon suitable buildings and otherwise improve it.

"In counties in which there is a county agricultural society which has purchased, or leased, for a term of not less than twenty years, real estate as a site on which to hold fairs or in which the title to such site is vested in fee in the county, the board may erect or repair buildings or otherwise improve such site and pay the rental thereof, or contribute to or pay any other form of indebtedness of said society, if the director of agriculture has certified to the board that the county agricultural society is complying with all laws, rules, and regulations governing the operation of county agricultural societies. The board may appro-

priate from the general fund such an amount as it deems necessary for any of said purposes. If the amount appropriated to be expended in the purchase of such real estate or in the erection of buildings or other improvements or payments of rent or other forms of indebtedness of said society exceeds twenty thousand dollars in any one year, such expenditure shall not be made unless the question of a levy of the tax therefor is submitted to the qualified electors of the county at a general election, a notice of which, specifying the amount to be levied, has been given at least thirty days previous to such election, in one or more newspapers published and of general circulation in the county. The board shall pass a resolution authorizing the submission of the question to the electors and certify their action to the board of elections of the county which shall prepare and furnish the necessary ballots and other supplies. Such certification shall be made to the board of elections not later than four p.m. of the ninetieth day before the day of the election. The form of the ballots cast at such election shall be:

"'Agricultural tax—Yes.'
"'Agricultural tax—No.'

"If fifty-five per cent of the vote cast is in favor of such tax, it may be levied and collected as other taxes.

"The requirement that the question of a tax levy be submitted to the electors shall not apply where the funds to be expended have been received as reparation for damage to the fairground caused by use thereof for military purposes."

Ohio Revised Code, Section 1711.16

"When the control and management of a fairground is in a county agricultural society, and the board of county commissioners has appropriated an amount or levied a tax for the aid of such society as provided in section 1711.15 of the Revised Code, the society, with the consent of the

board, may contract for the erection or repair of buildings or otherwise improve said site, to the extent that the payment for said improvement is provided by said board.

"When such appropriation is made by the board or when such tax is collected by the county treasurer, the county auditor shall place the proceeds in a special fund, designated the 'county agricultural society fund,' indicating the purpose for which it is available, and on application of the treasurer of the society, said auditor shall issue his order for the amount of such appropriation or tax to said treasurer of the society, if the society has secured the certificate required under section 1711.05 of the Revised Code, on said treasurer's filing with said auditor a bond in double the amount collected, with good and sufficient sureties approved by said auditor, conditioned for the satisfactory paying over and accounting of such funds for the purposes for which they were provided. Said funds shall remain in the special fund in which they are placed by said auditor until they are applied for by the treasurer of the society and such bond is given, or until they are expended by the board for the purposes for which said fund was created. If such society ceases to exist or releases said fund as not required for the purposes for which the fund was created, the board may by resolution transfer said fund to the general fund of the county."

Ohio Revised Code, Section 1711.18

"In a county in which there is a county agricultural society indebted fifteen thousand dollars or more, and such society has purchased a fairground or title to such fairground is vested in fee in the county, the board of county commissioners, upon the presentation of a petition signed by not less than five hundred resident electors of the county praying for the submission to the electors of the county of the question whether or not county bonds shall be issued and sold to liquidate such indebtedness, shall, by resolution within ten days thereafter, fix a date, which shall be within

thirty days, upon which the question of issuing and selling such bonds, in the necessary amount and denomination, shall be submitted to the electors of the county. The board also shall cause a copy of such resolution to be certified to the county board of elections and such board of elections, within ten days after such certification, shall proceed to make the necessary arrangements for the submission of such question to such electors at the time fixed by such resolution.

"Such election shall be held at the regular places of voting in the county and shall be conducted, canvassed, and certified, except as otherwise provided by law, as are elections of county officers. The county board of elections must give fifteen days' notice of such submission by publication in one or more newspapers published in the county once a week for two consecutive weeks, stating the amount of bonds to be issued, the purpose for which they are to be issued, and the time and places of holding such election. Those who vote in favor of the proposition shall have written or printed on their ballots 'for the issue of bonds' and those who vote against it shall have written or printed on their ballots 'against the issue of bonds.' If a majority of those voting upon the question of issuing the bonds vote in favor thereof, then and only then shall they be issued and the tax provided for in section 1711.20 of the Revised Code be levied."

Ohio Revised Code, Section 1711.33

"When a board of county commissioners pays or has paid money out of the county treasury for the purchase of real estate as a site for the holding of fairs by a county agricultural society, the society shall not encumber such real estate with any debt, by mortgage or otherwise, without the consent of the board, entered upon its journal.

"When such consent is obtained, the society may encumber such real estate, in order to pay the cost of necessary

repairs and improvements thereon, up to an amount not exceeding fifty per cent of its value. In order to ascertain the value of such real estate the board shall appoint three disinterested freeholders who are residents of the county to appraise such real estate. The appraisers so appointed shall, within ten days after their appointment, upon actual view of such real estate, appraise it and return such appraisement under oath to the board. The appraisement so made shall be considered the value of such real estate for the purpose of mortgage or other encumbrance."

AUG 16 1956
JOHN T. FEY, Cle

No. 105.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

EARL LeROY SCOTT, HARRY D. CROOK, EXECUTOR ESTATE OF ESTHER SCOTT CROOK, DECEASED, AND HERBERT KUBLY,

Petitioners,

vs.

FARMERS COOPERATIVE EXCHANGE,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Brief
Of C

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 105.

EARL LeROY SCOTT, HARRY D. CRONE, EXECUTOR ESTATE OF ESTHER SCOTT CRONE, DECEASED, AND HERBERT NUSHAWG,

Petitioners,

vs.

FAYETTE COUNTY AGRICULTURAL SOCIETY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

QUESTIONS PRESENTED.

The questions presented for review by petitioners in their petition for writ of certiorari are substantially those urged by them in the Supreme Court of Ohio in their appeal as of right to that court, which appeal was dismissed

for the reason no debatable constitutional question was involved therein (p. 19a, Appendix C). The Ohio Court of Appeals, the last court below making a judgment on the merits of the case after hearing, decided these same questions on non-constitutional grounds adversely to petitioners, after petitioners urged in that court that there were no constitutional questions involved. The questions now urged by petitioners, without the constitutional implications added after entry of the judgment sought to be reviewed, are as follows:

1. Is the source or availability of funds to pay an award in an appropriation proceeding relevant where the amount awarded must be deposited or paid before title may be vested in, or possession taken by, the appropriating authority?

2. Are the questions of the necessity for and the extent of property to be taken by eminent domain judicial questions in the absence of fraud, bad faith or abuse of discretion on the part of the appropriating authority making the determination?

3. Is a use which is admittedly for the "public welfare" not a "public use" because the use is infrequent or of limited annual duration, where the legislature of a state has specifically provided that the use in question is a public use for which property may be appropriated?

ADDITIONAL STATUTES INVOLVED.

In addition to the statutes claimed by petitioners to be involved, the following pertinent portions of sections of the Ohio Revised Code were considered by the courts below:

Section 719.12:

> "* * * As soon as the municipal corporation pays the compensation assessed, or secures its payment by a deposit of money under the order of the court, it may take possession of such property."

Section 719.16:

"An absolute estate in fee simple shall be vested in a municipal corporation, upon the payment or deposit by such municipal corporation of the amount assessed * * *"

Section 1711.13:

"County agricultural societies are hereby declared bodies corporate and politic, and as such they shall be capable of suing and being sued and of holding in fee simple any real estate purchased by them as sites for their fairs. * * *"

STATEMENT OF CASE.

The opinion of the Ohio Court of Appeals (Appendix B) well states the relevant facts as found by that court as a fact-finding body on a trial *de novo* of this case. The statement of the case in petitioners' petition for writ of certiorari departs in a great number of particulars from the facts of record. Furthermore, their statement of the case includes substantial argument and partisan conclusions on the issues of law involved below. The following corrections of deviations by petitioners from the facts of record are presented:

(a) The ten (10) acre strip of land is included in the lease to the County Commissioners and the evidence shows that it has been subjected to actual use under the lease. The lease does give petitioners the right to sell such property and replace it with other adjacent property, but that does not alter the fact that it is presently subject to the lease.

(b) Respondent is not "a private corporation organized for profit". Under the Ohio law as will be hereinafter shown, a county agricultural society could not qualify as such were it so organized.

(c) The Ohio Court of Appeals held that the activities which petitioners label "private uses" at page 6 of their petition here are public uses (p. 14a, Appendix B).

(d) Petitioners did not raise the constitutional questions here sought to be reviewed in their complaints. They alleged therein only that "Sec. 19 of the Ohio Bill of Rights and the 5th Amendment of the Constitution of the United States" were concerned. No claim was made that the Fourteenth Amendment to the Constitution of the United States was involved (R. 40, 69).

(e) The Ohio Court of Appeals, after trial *de novo*, reversed the judgment of the Common Pleas Court, on the following grounds:

(1) Petitioners' pleadings were improper.

(2) Petitioners, by reason of their inequitable conduct, were not entitled to equitable relief.

(3) Petitioners failed to present any evidence to sustain their allegations.

(4) Petitioners' claims were without legal basis.

(5) Petitioners had an adequate legal remedy.

It is of interest to note the extent of agreement between the courts below. Petitioners claimed twenty (20) causes of action. The Court of Common Pleas dismissed nineteen (19) of them. On additional evidence, the Court of Appeals dismissed all twenty (20). The Supreme Court of Ohio found there were neither debatable constitutional questions nor questions of public or great general interest involved.

(f) No federal constitutional question was decided by the Court of Common Pleas. Whether any Ohio constitutional question was there decided is a matter for debate. Respondent admittedly interpreted that decision as being on Ohio constitutional grounds. Petitioners, on the other hand, claimed in the Court of Appeals that no constitu-

tional issue, state or federal, was involved. Since the judgment now attacked by petitioners resulted from a *de novo* hearing in the Court of Appeals, there is no point in exploring here the meaning of the decision in the Common Pleas Court. The material fact is that no constitutional issue was raised or decided by the Court of Appeals which petitioners can now inject into the case by virtue of their general exceptions to the judgment and decree of that court on *de novo* hearing (Appendix B).

The only constitutional provisions claimed to be involved by petitioners in their assignments of error filed in the Supreme Court of Ohio were "Sec. 19 of Art. I of the Ohio Constitution, and the Fifth Amendment of the Constitution of the United States." The Supreme Court of Ohio merely held that neither was involved and dismissed the appeal.

REASONS FOR NOT GRANTING THE WRIT.

I.

The Federal Questions Alleged To Be Presented Are So Plainly Devoid Of Merit As To Be Frivolous.

Petitioners claim the following to be unconstitutional as violative of the Fifth and Fourteenth Amendments to the Constitution of the United States and Section 19 of Article I of the Constitution of Ohio:

(a) Section 1711.14, Ohio Revised Code, empowering county agricultural societies with the right of eminent domain.

(b) Respondent's failure to have on hand sufficient funds to pay any possible compensation award a jury might determine before instituting an eminent domain proceeding.

(c) Respondent's attempted appropriation of lands used by it for many years for purposes of an agricultural fair.

In addition, petitioners assign errors allegedly committed by Ohio courts in failing to make the findings of fact and conclusions of law urged by them.

State Constitutional Questions.

Of course, the claims that the statute and appropriation proceedings are unconstitutional as violative of the Ohio Constitution present no Federal questions, since it is well settled that decisions of state courts are final in matters of procedure and on alleged conflicts between the statutes of the state and its constitution. *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. Ed. 1165. This Court has no jurisdiction to review questions of constitutionality under state constitutions. *Highland Farms Dairy v. Agnew*, 300 U. S. 608, 81 L. Ed. 835; *Atchison Ry. v. Railroad Comm.*, 283 U. S. 380, 75 L. Ed. 1128. The allegations of unconstitutionality under Section 19, Article I of the Constitution of Ohio are therefore on their face without merit here.

The Fifth Amendment.

The claims of unconstitutionality under the Fifth Amendment to the Constitution of the United States are likewise obviously without merit and fail to present any Federal questions. At this late date it could be assumed to be general knowledge that the Fifth Amendment contains no restrictions on the powers of the states. *Corkran Oil Co. v. Arnaudet*, 199 U. S. 182, 50 L. Ed. 143; *Chapin v. Fye*, 179 U. S. 127, 45 L. Ed. 119. Since the Fifth Amendment has no application the averment of its violation by state action creates no Federal question. *Winous Point Shooting Club v. Caspersen*, 193 U. S. 189, 48 L. Ed. 675.

Erroneous Decisions of Fact and State Law.

Considering next the alleged errors in the determination of facts and the application of Ohio law thereto by the Ohio courts, the decisions of this Court have again and again advised that no Federal question can be based thereon. The decision of a state court upon questions of fact are ordinarily final and binding on this Court. *Aetna Life Ins. Co. v. Dunken*, 266 U. S. 389, 69 L. Ed. 342; *Miedreich v. Lauenstein*, 232 U. S. 236, 58 L. Ed. 584; *Egan v. Hart*, 165 U. S. 188, 41 L. Ed. 680. Furthermore, the fact that a state court has rendered an erroneous decision on a question of state law does not give rise to a Federal question or otherwise confer appellate jurisdiction on this Court. *Brinkerhoff-Faris Co. v. Hill*, 281 U. S. 673, 74 L. Ed. 1106; *McDonald v. Oregon Navigation Co.*, 233 U. S. 665, 58 L. Ed. 1145.

The Fourteenth Amendment.

There remain only the allegations of unconstitutionality under the Fourteenth Amendment. In this connection petitioners claim:

(a) A county agricultural society may not constitutionally appropriate property, even though the Ohio statutes specifically empower them to do so.

(b) The Ohio statutes as applied to the instant case are unconstitutional as not providing for reasonable compensation to petitioners, although under Ohio law respondent may not take possession of or title to petitioners' property until after such compensation has been paid and upon failure to do so must pay all costs and petitioners' attorneys' fees.

(c) Respondent is seeking to appropriate lands in excess of that necessary for its uses, even though the evi-

dence is that every foot of the tract sought is and has for many years been used as a county fairground.

(d) A county agricultural fair and related activities of limited annual duration are not public uses for which property may be appropriated, even though the Ohio legislature has specifically determined such uses to be public ones.

Petitioners state that an Ohio county agricultural society is a private corporation for profit and thus cannot constitionally utilize the power of eminent domain. Both the statement and the conclusion are false. Respondent is an Ohio county agricultural society and, as such, is a public institutional corporation, a "body corporate and politic" of the State of Ohio, without the necessity of being incorporated as are other corporations. Ohio Revised Code Section 1711.13; *State v. Kerns*, 104 Ohio State 550, 136 N. E. 217. Even assuming, although untrue, that respondent is a private corporation, conferment by state and nation of the power of eminent domain upon private corporations for public uses has long been judicially accepted despite the presence of benefit to private persons. *Union Lime Co. v. Chicago & N. W. Ry. Co.*, 233 U. S. 211, 58 L. Ed. 924; *Langenau Mfg. Co. v. Cleveland*, 159 Ohio State 525, 112 N. E. 2d. 658. Furthermore, whether a given corporation is entitled to exercise the power of eminent domain under state law presents only a question of state law and not a Federal question. *Stone v. Southern Illinois Bridge Co.*, 206 U. S. 267, 51 L. Ed. 1057. The courts below have sustained respondent's right to exercise the power. Although possibly interesting academically, the question is further foreclosed by the evidence of record that no person may or does derive any direct profit whatsoever from respondent's activities in furthering the agricultural pursuits of Fayette County residents.

Petitioners take the position that, since they claim the property to be worth $250,000.00, respondents must have had on hand $250,000.00 before it could commence an appropriation proceeding without violating the Fourteenth Amendment. Without doubt both the Ohio Constitution and the Fourteenth Amendment require that compensation be made if property is taken by eminent domain. That question, however, is not involved here. Petitioners claim only that since respondent does not now have $250,000.00 in its treasury it cannot "secure" or "assure" the payment of a compensation award. The conclusive answer to these contentions is that respondent cannot take petitioners' lands until after payment of an award. Section 19 of Article I of the Constitution of Ohio requires in this case that respondent shall first pay or deposit the amount of the award before taking possession or title to the property. Ohio Revised Code Sections 719.06 to 719.21 (governing proceedings by municipal corporations) govern proceedings by a county agricultural society, *Fayette County Agricultural Society v. Wohlheter*, 91 Ohio App. 205, 107 N. E. 2d. 925, which procedure is in accordance with Section 19 of Article I of the Ohio Constitution. *Cincinnati v. Rogers*, 56 Ohio State 769, 49 N. E. 1108. Sections 719.12 and 719.16 require that the compensation awarded by a jury be paid to petitioners or deposited with the court *before* respondent may take possession of or be vested with title to their property. If respondent should be unable or unwilling to pay the amount of the award within the six (6) month limitation period provided by the statute, the appropriation proceeding is voided and respondent would be required to pay the costs of suit and petitioners' attorneys' fees (Section 719.21). Petitioners therefore must receive the award prior to a taking of their property and

if there is no taking respondent must save them from all costs and expenses. How then can they be prejudiced? The Ohio statutes involved here give petitioners far more than they are entitled to under the Fourteenth Amendment. This Court has held that due process does not require that a landowner be paid before surrendering possession of his property or that he be reimbursed for his attorneys' fees and expenses. *Dohany v. Rogers*, 281 U. S. 362, 74 L. Ed. 904.

We are in agreement with the point that the Fourteenth Amendment requires the payment of compensation to be assured or secured when property is taken by eminent domain prior to actual payment. Where, however, payment must be made prior to a taking, there is no longer anything to be assured or secured. The authorities cited by petitioners on this question are numerous, but none are in point. Many concern statutes which granted the power of eminent domain, with payment to be made from specific appropriations of money, but without such moneys having been provided, such as *Pauchogue v. Long Island State Park Commission*, 243 N. Y. 15, and *State Ex Rel Chesterly v. Superior Court of Yakima*, 19 Wash. (2d) 791. The statute concerned in *Bragg v. Yeargin*, 145 Tenn. 643, provided that a school board could take title to and possession of property upon depositing with the county trustees the amount of the appraisal of a board of appraisers. Since under the statute this determination was not final, the Supreme Court of Tennessee quite properly held that the statute was invalid since full compensation has not been made prior to the taking as required in that State.

Connecticut River R. Co. v. Franklin County Com'rs., 127 Mass. 50, concerned a statute granting the power of eminent domain to a railroad and providing that the com-

pensation should be paid for from the earnings of the railroad after the taking. The court held that this could not be called certain compensation. The statute in the case of *In Re Manderson*, 51 Fed. 501, provided that "the title to any additional lands acquired for this purpose shall be vested in the United States without charge to the latter." Naturally, the court held the statute to be unconstitutional since it expressly declared that no compensation was to be paid for the property taken. *McArthur v. Kelly*, 5 Ohio 140, concerned a statute which failed to provide any procedure whatsoever for determining the compensation to be paid landowners. In *Haverhill Bridge Props. v. Essex County Com'rs.*, 103 Mass. 120, the statute involved provided for no compensation other than a right of action against certain towns, without process by which the right might be enforced. The court found no constitutional objection in *Brickett v. Haverhill Aqueduct Co.*, 142 Mass. 394, to a statute which did not require payment prior to a taking.

The cited case of *Sweet v. Rechel*, 159 U. S. 380, 40 L. Ed. 188, is hardly authority for petitioners. Here this Court found not only that the statutory provision for payment of compensation was adequate but the case is a landmark for the proposition that the Federal Constitution does not require compensation to be actually paid in advance of a taking. In *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 659, 34 L. Ed. 295, the landowners claimed that there was no reasonable, certain and adequate provision for payment of compensation since a jury might bring in an award higher than the sum deposited in the court prior to trial as required by the statutes concerned, although title could not pass until the jury award of compensation was actually paid. This is essentially the claim

made by petitioners here and the statutes are identical in effect. This Court held the contention to be without merit, as follows:

> "* * * But, clearly, the title does not pass until compensation is actually made to the owner. Within the meaning of the (Federal) Constitution, the property, although entered upon, pending the appeal, is not taken until the compensation is ascertained in some legal mode, and, being paid, the title passes from the owner * * *".
>
> "* * * The apprehension, therefore, that the plaintiff may lose its property without receiving just compensation therefor, is without foundation."

It is obvious that petitioners' apprehensions that they may not receive compensation for their property are equally without merit and their claims are plainly unsubstantial.

Petitioners next claim that respondent is attempting to appropriate property in excess of what they believe to be necessary for the purpose of holding an agricultural fair. The facts of record show that respondent has in the past used the same 47 acres it seeks to appropriate for such purposes. Furthermore, the evidence shows that the only entrance into and a roadway over the fair grounds is across and over the 10 acre tract claimed not to be necessary. There is not one shred of evidence in the record to the effect that the 10 acres are not necessary. Petitioners offered no evidence whatsoever on this issue. As a matter of fact, therefore, as found by the court below, there is no question of excess condemnation. But petitioners, conceding that the questions of necessity for and extent of property to be taken by eminent domain are legislative questions, claim that the rule is otherwise here because respondent acted in bad faith as to these 10 acres. The Ohio Court of Appeals found otherwise (p. 15a, Appendix B). Petitioners here again offered no evidence that re-

spondent had ulterior purposes in taking the 10 acres, but merely claimed as they do here that such purpose was obvious. This Court in *Sears v. Akron*, 246 U. S. 242, 62 L. Ed. 688, held both that the determination of necessity for and extent of property to be taken are legislative questions and that general allegations of fraud, such as are made here by petitioners, will not supply the absence of proof entitling them to equitable relief. The court below held identically on this question and its decision can hardly be said to have violated petitioner's constitutional rights under the Fourteenth Amendment. *Backus v. Depot Co.*, 169 U. S. 557, 568, 42 L. Ed. 853.

Petitioners in conclusion deny that a county agricultural fair and its allied activities in the promotion of agricultural pursuits are a necessary public use and that therefore the Fourteenth Amendment prohibits appropriation of their property for such purposes. They make much of the term *necessary*, but neither the Fourteenth Amendment, the Ohio Constitution nor the Ohio statutes use the term. Furthermore, the Constitution of Ohio requires only that the use be for the "public welfare". *State v. Rich*, 159 Ohio State 13, 110 N. E. 2d. 778.

Both the legislature of Ohio (Section 1711.14) and the court below (p. 16a, Appendix B) have determined that an agricultural fair is a public use. In *Traction Co. v. Mining Co.*, 196 U. S. 239, 49 L. Ed. 462, this Court held:

> "It is for the State, primarily and exclusively, to declare for what local public purposes private property, within its limits, may be taken upon compensation to the owner, as well as to prescribe a mode in which it may be condemned and taken."

This Court has often held that it will accept the judgment of a state court holding a described use for which property may be taken to be a public one unless the holding

is clearly without any basis whatsoever. *Union Lime Co. v. Chicago & N. W. Ry. Co.*, 233 U. S. 211, 58 L. Ed. 924.

Petitioners cite *Hairston v. Danville & Western R. Co.*, 208 U. S. 598, 52 L. Ed. 637, *Cincinnati v. Vester*, 281 U. S. 439, 74 L. Ed. 950, and *Sargent v. Cincinnati*, 110 Ohio State 444, 144 N. E. 132, for the proposition that the question of a public use is ultimately a judicial question. Whether such is true or not is of only academic interest here, since both legislative and judicial determinations have qualified respondent's uses and purposes to be public. Both the *Hairston* and *Vester* cases were discussed by this Court in *United States v. Welch*, 327 U. S. 546, 90 L. Ed. 843, as follows:

> "* * * It is true that this Court did say in *Cincinnati v. Vester*, 281 U. S. 439, 446, that 'It is well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one.' But the Court's judgment in that case denied the power to condemn 'excess' property on the ground that the state law had not authorized it. And in *Hairston v. Danville & Western R. Co.*, 208 U. S. 598, 607, this Court, referring to the 'rule' later stated in the *Vester* case, said that 'No case is recalled where this court has condemned as a violation of the Fourteenth Amendment a taking upheld by the state court as a taking for public uses in conformity with its laws.'"

Here again no colorable Federal question is presented.

This Court has often reiterated that it has no jurisdiction to review a judgment of a state court merely because a Federal question is claimed; the claimed Federal question must have substance or foundation to give such jurisdiction, and not be so plainly devoid of merit as to be frivolous. *Parker v. McLain*, 237 U. S. 469, 59 L. Ed. 1051; *Deming v. Packing Co.*, 226 U. S., 102, 57 L. Ed. 140.

A claimed question of constitutionality may be plainly unsubstantial, either because it is "obviously without merit" or because "its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Ex Parte Poresky*, 290 U. S. 30, 78 L. Ed. 152. Petitioners' claimed Federal questions are plainly unsubstantial and frivolous under either test.

II.

The Federal Questions Alleged To Be Presented Were Not Raised In Or Passed Upon By Any State Court And Are Raised In This Court In The First Instance.

Although the Fifth Amendment was claimed to be involved in the Supreme Court of Ohio, no such claim was made in the Ohio Court of Appeals, the judgment of which petitioners ask this Court to review. Even if that provision had been urged there no Federal question would have been raised. *Winous Point Shooting Club v. Caspersen*, 193 U. S. 189, 48 L. Ed. 675. Petitioners alleged in their amended petition in the Common Pleas Court violations of the Ohio Constitution and the Fifth Amendment only, without any claim under the Fourteenth Amendment. No Federal constitutional question was passed upon by that court.

In the Ohio Court of Appeals the case was heard *de novo* on additional evidence and on the same pleadings. Petitioners not only urged no constitutional questions, State or Federal, to that court, but expressly denied any such questions were present at pages 5 and 9 of their brief in the Court of Appeals, as follows:

> "We point out that Judge Schneider did not declare Sec. 9885-1 (Revised Code Section 1711.14) to be un-

> constitutional, neither do we argue its unconstitutionality, or think it necessary to do so."
>
> "In conclusion we repeat that it is not necessary to declare Sec. 9885-1 G. C. now 1711.14 R. C. to be unconstitutional."

The Ohio Court of Appeals decided no constitutional questions, none being urged, but held adversely to petitioners on numerous grounds, among which were defective pleadings, failure to meet their burden of proof or to offer any proof of their allegations, Ohio law contrary to their claims, the presence of an adequate legal remedy and the fact that, by reason of their questionable conduct, petitioners were not entitled to equitable relief (p. 13a, Appendix B). It is well settled that this Court has no jurisdiction to review a judgment of a state court if the judgment rests upon an independent basis of state law even though a Federal question may be presented. *Ellis v. Dixon,* 349 U. S. 458, 99 L. Ed. 1231, and *Commercial Bank v. Rochester,* 15 Wall. 639, 21 L. Ed. 948 (defective pleadings); *Crary v. Devlin,* 154 U. S. 619, 38 L. Ed. 1127 (alleged facts not proven); *McQuade v. Trenton,* 172 U. S. 636, 43 L. Ed. 595 (adequate legal remedy); and *Utley v. St. Petersburg,* 292 U. S. 106, 78 L. Ed. 1155, and *Gillis v. Stinchfield,* 159 U. S. 658, 40 L. Ed. 295 (estoppel and denial of equitable relief because of questionable conduct).

The Supreme Court dismissed the appeal from the judgment of the Court of Appeals, finding no "debatable constitutional question is involved" (p. 19a, Appendix C), after petitioners urged in that court the relevancy of the Ohio Constitution and the Fifth Amendment again. When the Supreme Court of Ohio dismisses an appeal from a judgment of the Ohio Court of Appeals which decided no Federal question, upon the express ground that no consti-

tutional question was involved, it must be concluded that the Ohio Supreme Court's judgment involved no Federal question. *Cuyahoga Power Co. v. Northern Realty Co.*, 244 U. S. 300, 61 L. Ed. 1153.

No court below has passed on, and petitioners have failed to raise any Federal question before reaching this Court, where for the first time they urge the applicability of the Fourteenth Amendment. It must affirmatively appear upon the face of the record that a Federal question was presented to and expressly or necessarily decided by a state court before this Court has jurisdiction to review a state court's judgment. *Mellon v. O'Neil*, 275 U. S. 212, 72 L. Ed. 245. And where only the Fifth Amendment was claimed below, a party may not claim for the first time in this Court that the Fourteenth Amendment is involved. *Chapin v. Fye*, 179 U. S. 127, 45 L. Ed. 119. The record below does not show that the Fourteenth Amendment was pleaded, proven, referred to, mentioned or in any manner set up or claimed. The claim does not seem ever to have been thought of until the case reached this Court. It is too late to raise it now. *Manhattan Life Ins. Co. v. Cohen*, 234 U. S. 123, 58 L. Ed. 1245; *Rogers v. Clark Iron Co.*, 217 U. S. 589, 54 L. Ed. 895.

CONCLUSION.

The Fourteenth Amendment cannot be availed of as a means of bringing to the Supreme Court the abstract opinions of every unsuccessful litigant as to the justice of the state decision against him or of the merits of the legislation on which such a decision may be founded. *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. Ed. 269. Petitioners' claims in this Court amount to no more than such abstract opinions and unfounded apprehensions.

No court below has decided any Federal questions and in the court the judgment of which they request this Court to review, petitioners urged there were no constitutional questions, State or Federal, involved. This Court will not undertake to review what the court below did not decide. *Walters v. St. Louis*, 347 U. S. 231, 233, 98 L. E. 660.

The case of *Winous Point Shooting Club v. Caspersen*, 193 U. S. 189, 48 L. Ed. 675, is directly in point here. As in the instant case, the landowner there brought his action to enjoin defendants from using his property in the Ohio Common Pleas Court, which court denied his petition after having found as a matter of fact that the property in dispute was public. The case was then tried *de novo* in the Ohio Court of Appeals, and as here, the petition was again dismissed. Plaintiff then appealed to the Supreme Court of Ohio, for the first time claiming a violation of Section 19, Article I, of the Constitution of Ohio, and the Fifth Amendment to the Constitution of the United States, as his property had been taken without just compensation. Here was the first and only claim of unconstitutionality, and the constitutional provisions raised are identical to those raised by Petitioners in the same court. The Supreme Court of Ohio affirmed the judgment and the landowner requestpd this Court to review the case. The Court found no Federal question and disposed of the case in the following language at page 191 of the opinion:

> "* * * plaintiff's contention was that the judgment of the Circuit Court was in violation of the Fifth Amendment. But that amendment is a restriction on Federal power, and not on the power of the States. * * *"
>
> "Federal questions cannot be raised here which did not arise below, and as the Fifth Amendment had no application the averment of its violation created no Federal question."

The Federal questions alleged to be presented are frivolous and are raised in this Court in the first instance. The petition for a writ of certiorari should be denied.

Respectfully submitted,

LYMAN BROWNFIELD,
C. WILLIAM MALONE,
50 W. Broad St., Columbus 15, Ohio,
Counsel for Respondent.

BROWNFIELD AND MALONE,
Of Counsel.